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U.S. Department of Homeland Security
20 Mass, Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: LOS ANGELES DISTRICT OFFICE Date: NOV 05 2004

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Ecuador. The applicant was found inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I). The record reflects that the applicant is the spouse of a U.S. citizen and father of two U.S. citizen children.

The district director found that the applicant had failed to establish extreme hardship to his U.S. citizen spouse and denied the application accordingly.

On appeal, counsel contends that the applicant established extreme hardship to his wife and children. In support of the appeal, counsel submits a brief. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act provides, in pertinent part:

> (i) In general.—Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the elements of—
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> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, . . .
> > . . .
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> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if—
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> > (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correction institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or
> >
> > (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was actually carried out.

8 U.S.C. § 1182(a)(2)(A). The district director based the finding of inadmissibility under this section on the applicant's 1997 conviction for felony false statements to the Federal Deposit Insurance Corporation and conspiracy, in violation of 18 U.S.C. §§ 1014 and 371. *Decision of the District Director* (September 17,

2003) at 2. The district director's determination of inadmissibility is not contested by the applicant. Section 212(h) of the Act provides, in pertinent part:

> The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . if—
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> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that—
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> (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
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> (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
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> (iii) the alien has been rehabilitated; or
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> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien;
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> . . . and
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> (2) the [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status. . .

8 U.S.C. § 1182(h). Because less than 15 years have passed since the applicant's conviction, the applicant is statutorily ineligible for a waiver under 212(h)(1)(A). A section 212(h)(1)(B) waiver is dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse, parent, or child of the applicant. Hardship to the alien himself is not a permissible consideration under the statute.

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez,* the Board of Immigration Appeals (BIA) set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. These factors include, with respect

to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

> Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted). In addition, the Ninth Circuit Court of Appeals has held, "the most important single hardship factor may be the separation of the alien from family living in the United States," and, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). *See also Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. Separation of family will therefore be given the appropriate weight under Ninth Circuit law in the assessment of hardship factors in the present case. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996).

Counsel asserts that the applicant's spouse and children speak no Spanish and have no family ties to Ecuador. The applicant's spouse, born in Lebanon, has lived in the United States for over 15 years. She states that her parents, siblings and other extended family live in the United States. *Evaluation by Adriana Camargo-Fernandez, Ph.D. PSY* (February 24, 2003), at 3 (*"Psych Eval"*). Counsel also asserts that the applicant's two daughters, aged 8 and 10, were born in the United States and are acculturated and accustomed to life here. Counsel asserts that, as applicant's wife is a housewife, she has no skills and would not be able to find employment in Ecuador and that the political conditions in Ecuador render it unsafe. Documentation of country conditions in support of these contentions is absent from the record. The applicant stated to the psychologist that he expects to return to poor circumstances in Ecuador because he grew up poor there, has not been there in 20 years, and currently sends financial assistance to his family, including his parents and three siblings, who remain in impecunious circumstances. *Psych Eval* at 2.

The psychological assessment submitted with the appeal shows that the applicant's spouse is moderately depressed and experiencing severe anxiety. *Psych Eval* at 9. The applicant's daughter, Tatyana, was shown by tests to be more withdrawn or depressed than the average child her age. *Id.,* at 11. His daughter, [redacted] was found on testing to be anxious, depressed, withdrawn, and dependent. *Id.,* at 12. Both children "show marked tendencies for being withdrawn, insecure, immature, dependent, anxious, depressed and having poor coping skills. . . . Removal of their father would further aggravate all of the symptoms previously

described in young girls who are currently undergoing a sensitive and critical state." *Id.*, at 13. The applicant's children and his wife do not currently have diagnoses of mental illnesses or disorders. The psychologist predicts that, if separated from the applicant, they will develop depression and anxiety disorders. *Id.*, at 14-16.

Counsel emphasizes the contention that the positive discretionary factors in the case outweigh the negative. The AAO notes that discretion can only be exercised after the applicant is found statutorily eligible for a waiver based on a finding of extreme hardship to a qualifying relative.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's wife and children face extreme hardship if he is refused admission. Rather, the record demonstrates that they will face the unfortunate, but expected, disruptions, inconveniences, and difficulties in emotional, financial, and social arenas that arise whenever a spouse is removed from the United States. Congress provided for a waiver of inadmissibility, but under limited circumstances. In limiting the availability of the waiver to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship exists. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy,* 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai,* 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. *See* INS v. Jong Ha Wang, *450 U.S. 139 (1981)* (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

While the Ninth Circuit places particular emphasis on consideration of the impact of separation of the family, the waiver is nevertheless not to be granted in every case where possible separation is at issue. The record does not contain evidence that the applicant's spouse and children would face an uncommon hardship if separated from the applicant. Further, the applicant has failed to meet his evidentiary burden with respect to establishing that his spouse and children face extreme hardship if they relocate to Ecuador, particularly the absence of documentation of country conditions in Ecuador. The BIA has held, "[t]he mere election by the spouse to remain in the United States, absent [a determination of exceptional hardship] is not a governing factor since any inconvenience or hardship which might thereby occur would be self-imposed." *See Matter of Mansour,* 11 I&N Dec. 306, 307 (BIA 1965); *see also Shooshtary v. INS,* 39 F.3d 1049 (9th Cir. 1994) (stating, "[t]he uprooting of family, the separation from friends, and other normal processes of readjustment to one's home country after having spent a number of years in the United States are not considered extreme, but represent the type of inconvenience and hardship experienced by the families of most aliens in the respondent's circumstances.") In this case, the record does not contain sufficient evidence to show that the hardship faced by the qualifying relatives rises to the level of extreme. As stated by the Ninth Circuit, "[i]n sum, this case is devoid of those unique extenuating circumstances necessary to demonstrate 'extreme hardship.'" *Ramirez-Durazo v. INS,* 794 F.2d 491, 499 (9th Cir. 1986).

The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse and children, as required under INA § 212(h), 8 U.S.C. § 1186(h). As the applicant is not statutorily eligible for the waiver, no purpose would be served in discussing whether he merits a favorable exercise of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212 of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.